In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 124

JOSEPH AIUPPA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1968. The petition for a writ of certiorari was filed on May 24, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the testimony of the government's chief witness should have been excluded as the product of an unlawful search and seizure.
2. Whether the evidence supports the verdict.
3. Whether the trial judge erred in refusing to in-

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terrogate the jury with respect to its exposure to prejudicial articles appearing in newspapers during the two-day trial.

4. Whether the trial court erred in allowing the jury to separate for lunch during the course of its deliberations.

5. Whether the court's instruction to the jury that a defendant cannot be compelled to testify and that the jury may not in any manner draw an inference against the defendant because of his failure to testify was improper.

STATEMENT

After a jury trial in the United States District Court for the District of Kansas, petitioner was convicted on two counts of an indictment charging the unlawful possession and transportation of migratory birds in violation of 16 U.S.C. 703. On August 19, 1966, he was sentenced to imprisonment for three months and to a fine of $500 on each count.

Petitioner had been convicted on both counts of the indictment in 1963 but that conviction was reversed on the ground that evidence as to the seizure of 560 frozen mourning doves from petitioner's car should have been suppressed as the product of an unlawful search. *Aiuppa* v. *United States;* 338 F. 2d 146 (C.A. 10). The circumstances there shown were as follows. On September 24, 1962, a United States Game Management agent received information from an informer that petitioner and others had been hunting in the Frontenac-Pittsburg, Kansas area and had killed an enormous number of doves; and that one Andrew Williams was cleaning, packaging, and storing the

doves (App. 26). On October 1, 1962, that agent informed another agent at Springfield, Illinois, that petitioner and his wife had left Frontenac, Kansas, for Chicago in a Cadillac and were transporting between four and five hundred mourning doves (App. 11). The agent proceeded to petitioner's home in Elmhurst, Illinois, and searched his car in the driveway, thereby discovering the 560 doves (App. 14–16). The court of appeals ruled that federal game management agents do not have authority under 16 U.S.C. 706 to conduct a search without a warrant even though they have probable cause to believe that illegal game is in an automobile.

The federal game management agent in Kansas did not contact Andrew Williams until after October 1, 1962 (App. 27). At petitioner's second trial, the government's principal witness was Andrew Williams (App. 151–169), who was permitted to testify, over the objection of petitioner that Williams' testimony was the result of a lead emanating from the illegal search (App. 151–152). Williams testified that he cleaned a large number of mourning doves during the month of September 1962 (App. 152). He placed 10 doves each in plastic bags and stored the bags in ice boxes at a Dairy Queen store (App. 156, 161). Williams testified that he placed one of these "cartons" in petitioner's Cadillac and that three other "cartons" or "ice boxes" were placed in the car (App. 159–161). He assumed that there were approximately four or five hundred birds in the back of petitioner's car (App. 165).

Williams also testified that petitioner asked him for the best way to drive to Missouri without any traffic and he gave petitioner the directions which he requested (App. 163).

ARGUMENT

1. Petitioner contends that the testimony of Andrew Williams at the second trial should have been suppressed because it was obtained as a result of a lead emanating from the illegal search. The government had, however, learned from an informer, more than two weeks before the illegal search, that Williams was cleaning and packaging doves for petitioner. Since the government knew of Williams' existence prior to the illegal search it is immaterial that the government did not interview him until after the search. The government's knowledge was based on an independent source and was not the product of the subsequent illegal search. See *Wong Sun* v. *United States,* 371 U.S. 471; *United States* v. *Paroutian,* 319 F. 2d 661 (C.A. 2), certiorari denied, 375 U.S. 981.

Moreover, the proffer of a living witness cannot be mechanically equated with the proffer of inanimate evidentiary objects derived from an illegal search. In these circumstances, courts have focused on the attributes of will, perception, memory and volition involved in a live witness' testimony and have refused to reject such testimony solely because a lead may have been obtained as the result of a prior illegality. *Smith* v. *United States,* 324 F. 2d 879 (C.A.D.C.), certiorari denied, 377 U.S. 954; *Brown* v. *United States,* 375 F. 2d 310 (C.A.D.C.), certiorari denied,

388 U.S. 915; cf. *United States* v. *Bayer*, 331 U.S. 532, 539–541.

2. Petitioner contends that the evidence does not support the verdict because Williams could not specify exactly how many plastic bags were in the iceboxes and there was no direct proof that petitioner transported the doves in interstate commerce. The jury, however, may draw reasonable inferences from the facts proved, and on appeal the evidence and inferences must be construed most favorably to the government. *Glasser* v. *United States*, 315 U.S. 60, 80. It was reasonable to infer from the testimony by Williams that he observed four cartons in the rear of petitioner's car and that petitioner possessed more than the maximum number of 48 doves permitted under the statute. Indeed, Williams himself, a hostile witness, drew this inference. Similarly the fact that petitioner asked for and received directions to get "out of town to Missouri" was sufficient to support an inference that he transported the doves in violation of the statute.

3. After petitioner's first conviction was reversed, the case was transferred to Fort Scott, Kansas, 100 miles from Kansas City, because of prejudicial publicity. The instant case was tried on June 20 and June 21, 1966. At the close of the evidence, petitioner moved for a mistrial on the ground of prejudicial publicity in the Kansas City newspapers. He introduced in the record a story appearing on page 4 of the Kansas City Star referring to petitioner as a gangland figure and one appearing on page 19 of the Kansas City Times on June 21 referring to the refusal of govern-

ment witnesses to answer questions (App. 214–215, 280–282). Petitioner asked in the alternative that the court declare a mistrial or examine the jurors separately as to their exposure to these articles (App. 215). The court declined to grant either request, noting that it would not assume that the jury had read the articles and that to grant petitioner's request might call the attention of the jurors to the matter (App. 216). The court of appeals properly found the judge's action justified in these circumstances. The jury, when first selected, had been instructed not to talk about the case or form an opinion until all the evidence was in (App. 141) and this admonition was repeated at adjournment (App. 202). The newspaper stories were in inside pages of Kansas City, not local, newspapers. The charge was not one which would itself arouse emotion. Insofar as the article referred to petitioner as a gangland figure, it did not add significantly to the efforts of petitioner's counsel to paint a picture of discrimination. He said in closing argument (App. 222):

> We have a person who is from another state, and for some reason, and there's no mystery about it, because he has been painted in the press as a "bad man," but there isn't any proof of it. * * *

The judge instructed the jury (App. 238):

> [Y]ou are to disregard any information about the case which may have been received from sources outside of this trial. If any of you have read any newspaper articles or heard any radio broadcasts or telecasts related to this case, I want to caution you particularly that you are to

> put any such information entirely out of your consideration of this case, and you are to confine your consideration solely to the evidence adduced in this trial.

This Court has recognized that in determining whether there has been "prejudice resulting from the reading by jurors of news articles concerning the trial * * * each case must turn on its special facts." *Marshall* v. *United States,* 360 U.S. 310, 312. The "special facts" of this case clearly distinguish it from the flagrant prejudicial materials to which the jury was exposed in *Sheppard* v. *Maxwell,* 384 U.S. 333, and the various decisions of the courts of appeals upon which petitioner relies (Pet. 13–15).

4. Petitioner contends that it was error for the trial court to allow the jury to separate for lunch during the course of its deliberation. It is, however, within the sound discretion of the trial judge to permit such separation. See *Hines* v. *United States,* 365 F. 2d 649 (C.A. 10); *Cardarella* v. *United States,* 375 F. 2d 222 (C.A. 8), certiorari denied, 389 U.S. 882. There is no reason to apply to Fort Scott, Kansas, the absolute rule against separation laid down in *United States* v. *D'Antonio,* 342 F. 2d 667 (C.A. 7), for the Seventh Circuit whose major business comes from Chicago.

5. During the conference on instructions petitioner objected both to the giving of any instruction on the failure of petitioner to testify and to the phrasing of the proposed instruction (App. 209–210). The court instructed the jury as follows (App. 238):

> The law does not compel a defendant in a criminal case to take the witness stand and test-

> ify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of a defendant to testify.
>
> The legal theory for this rule is immaterial so far as you are concerned, but the important and vital point for you, as jurors, is that a defendant has the unqualified right not to take the stand and you may not in any manner draw any inference against the defendant because he did not take the stand.

This fair instruction to the jury on the impermissibility of drawing any inference from petitioner's failure to testify did not constitute an unconstitutional comment on that failure. See *Griffin* v. *California,* 380 U.S. 609, 615, n. 6. The court may properly give such a charge even though it was not requested by the defendant or even if the defendant objects. See, *e.g., Chadwick* v. *United States,* 117 F. 2d 902 (C.A. 5), certiorari denied, 313 U.S. 585; *Smith* v. *United States,* 112 F. 2d 217 (C.A.D.C.) certiorari denied, 311 U.S. 663.

For the reasons stated above, we believe that the petition for a writ of certiorari presents no question warranting review by this Court. We have the duty, however, to advise the Court that on December 5, 1961, prior to the commission of the offenses here involved, petitioner was overheard by an electronic device installed by trespass in a commercial establishment. Petitioner was not the target of this electronic surveillance and he was overheard talking about matters totally unrelated to the instant case. We propose to make a disclosure to the district court in accord-

ance with the procedure which this Court prescribes in *Kolod* v. *United States,* No. 133, October Term, 1967, pending on the government's motion to modify; *Ivanov* v. *United States,* No. 11, this Term; and *Butenko* v. *United States,* No. 197, this Term. In view of the utter irrelevancy of this single overhearing to this limited offense we suggest that, in order not to delay the final disposition of this case, it would be appropriate for the Court to rule on the certiorari petition on the basis of the questions raised rather than to grant the petition on the basis of the overhearing. A ruling denying certiorari would be without prejudice to further proceedings in light of this Court's decision in *Kolod, Ivanov, and Butenko.* See the Government's Brief in *Scandifia* v. *United States,* No. 1290, October Term, 1967.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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